Supreme Court, U.S.
FILED

95-265 JUL 5 1995

NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CLEVELAND INDUSTRIAL SQUARE, INC.,
Petitioner,

vs.

MICHAEL R. WHITE, Mayor of the City of Cleveland; DANNY R. WILLIAMS, Chief Law Director for the City of Cleveland; KENNETH G. SILLIMAN, Chief Assistant Law Director for the City of Cleveland; RONALD JONES, Commissioner, Division of Environment of the City of Cleveland; and WILLIAM ONDREY GRUBER, Assistant Law Director for the City of Cleveland.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD G. LILLIE (0023744)
Counsel of Record for Petitioner
55 Public Square, Suite 1331
Cleveland, Ohio 44113
(216) 781-0734

18 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PETITIONER'S COMPLAINT WHEN THE COMPLAINT COMPLIED WITH THE MANDATES OF CIVIL RULE 8 A.

Standard of Review: Abuse of Discretion

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PETITIONER'S COMPLAINT WHEN THE COMPLAINT WAS SUFFICIENTLY PLED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.

Standard of Review: Abuse of Discretion

TABLE OF CONTENTS

	PAGE
Questions Presented for Review.	i
Table of Contents	ii
Table of Authorities.	iii
Jurisdiction	v
Constitutional Provisions Involved.	vi
Statement of the Case	1
Argument	
I. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PETITIONER'S COMPLAINT PURSUANT TO RULE 12(B)(6)WHEN THE COMPLAINT COMPLIED WITH THE MANDATES OF CIVIL RULE 8 A	6
II. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PETITIONER'S COMPLAINT WHEN THE COMPLAINT WAS SUFFICIENTLY PLED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.	14
Conclusion	21
Appendix A U.S. District Court Order, January 14, 1994	
Appendix B U.S. Court of Appeals Order, April 6, 1995	

TABLE OF AUTHORITIES

Azar v. Conley, 456 F.2d 1382 (1972) . 16

Baker v. Lutheran Sparrowbush Associates, 808 F.Supp 972 (S.D.N.Y. 1992) . . 8, 11

Conley v. Gibson, 355 U.S. 41 (1957) 6,7,17

Evans v. McDonald's Corp., 936 F. 2d 1087 (1991) 8

Fontana v. Barnham, 707 F.2d 221 (1983) 15

Harris v. U.S., 204 F.Supp. 228, aff'd, 308 F.2d 573 (D.C. Mass, 1962) . . . 13

L'Orange v. Medical Protective Co., 394 F.2d 57, 59 (6th Cir. 1968) 17

Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972) 17, 18

Mercado v. Kingsley Area School, 727 F.Supp 335 . . . . . 11, 12

Newman v. Silver, 713 F.2d 14 (1983) . 8

Parratt v. Taylor, 451 U.S. 527 (1981) 15

Scher v. Board of Education of West Orange, 424 F.2d 741, 744 (3rd Cir. 1970) 18

Scheuer v. Rhodes, 419 U.S. 232 (1974) 12

Walter Reade's Theatres, Inc. v. Loew's, Inc., 20 F.R.D. 579(D.C.N.Y. 1957) 7

Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976) 7

Zinerman v. Burch, 494 U.S. 113 (1990) .10

RULES AND STATUTES

Title 42 United States Code, Section 1983 . . . . . passim

Rule 12 (B)(6), Federal Rules of Civil Procedure 12, 20

Rule 8, Federal Rules of Civil Procedure 6, 7

JURISDICTION

Jurisdiction of this court is invoked under the provisions of 28 U.S.C. Section 1254(1), and Rule 20, Rules of the Supreme Court of the United States.

The District Court issued its Order Dismissing Petitioner's Complaint on January 14, 1994. A copy of that opinion is attached hereto as Appendix "A". The Court of Appeals entered its judgment and opinion on April 6, 1995. A copy of that opinion affirming the decision of the District Court is attached hereto as Appendix "B".

CONSTITUTIONAL PROVISIONS INVOLVED

Involved herein is the Fourteenth Amendment of the United States Constitution, Section 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

STATEMENT OF THE CASE

On November 7, 1988, Petitioner herein, Petitioner, and the City of Cleveland (by and through its directors, agents, and employees) entered into an agreement whereby the City of Cleveland would deed a parcel of land to Petitioner, and in exchange Petitioner would construct a 92,000 square foot building within two years from the date the deed was recorded. The agreement was memorialized by a Development Contract, a Purchase Money Mortgage, an Official Deed, and a Promissory Note (collectively referred to herein as the "sale documents").

The Purchase Money Mortgage was entered into on November 17, 1988. The Mortgage provided that "if, by reason of Force Majeure, the Mortgagor is unable to perform or observe any agreement, term or

condition thereof, other than any obligation to make payments hereunder . . .the Mortgagor shall not be deemed in default during the continuance of such inability."

Petitioner applied to the City of Cleveland for the requisite building permits to begin construction on the 92,000 square foot building. After the shell permit was granted, Petitioner purchased steel and began grading the property. On April 5, 1990, however, the City denied Petitioner a use permit for the property and also denied all electrical permits. Petitioner appealed the decision to the Cleveland Board of Zoning Appeals and subsequently to the Cuyahoga County Court of Common Pleas. On February 21, 1991, the Trial Court ruled that the City's decision denying Petitioner the use permits and electrical

permits was arbitrary and unreasonable. This ruling, however, was later reversed by the Eighth District Court of Appeals on October 8, 1992. Thereafter, the head of the City's Economic Development Department informed Petitioner that the City did not want Petitioner to use the property as proposed and that the City was going to give Petitioner a notice of default.

The City, in its refusal to grant Petitioner a use permit, and subsequent issuance of a default notice (despite the fact that the City's previous conduct and the remedy thereof consumed a substantial period of time), Respondents effectively **prevented** Petitioner from constructing the building by refusing to issue the requisite permits. In so doing, Respondents created a situation of *force majeure*. Since the City refused to grant

the required permits, it placed Petitioner in the position that if it (Petitioner) proceeded with construction, it would be in violation of the City's building codes, and if it did not proceed with construction, it may be in default of the Official Deed.

On April 4, 1991, Petitioner filed a complaint in the Cuyahoga County Court of Common Pleas requesting a declaration that Petitioner was not in default and that the City was not entitled to re-enter, take possession of the property or revest the estate. Petitioner also sought a preliminary injunction against the City. Petitioner was completely unsuccessful in its pursuit of such matters throughout the underlying litigation at the state level.

On October 3, 1991, despite the fact that the City actually prohibited Petitioner, Petitioner, from performing

under the contract, applications, the City re-entered the property and took possession thereof. On July 8, 1992, the City removed two signs and structural steel from the property which belonged to Petitioner. To redress the wrongful activity of the City, Petitioner filed a complaint against Respondents in the Federal District Court pursuant to Title 42 USC Section 1983. On January 14, 1994, in the United States District Court for the Northern District of Ohio, Petitioner's Complaint was dismissed based upon Respondent's Motion to Dismiss and pursuant to Rule 12(B) (6) of the Federal Rules of Civil Procedure. As noted supra. on February 4, 1994, Petitioner filed its timely notice of Appeal to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed the trial court's decision on April 6, 1995.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING Petitioner'S COMPLAINT PURSUANT TO RULE 12 (B)(6)WHEN THE COMPLAINT COMPLIED WITH THE MANDATES OF CIVIL RULE 8(A).

Under the Federal Rules of Civil Procedure, the purpose of pleading is to facilitate a proper decision upon the merits. Conley v. Gibson, 355 U.S. 41 (1957).

Rule 8(a) specifically requires:

> **(a) Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a

> demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Rule 8(a) requires that each averment of a pleading be simple, concise and direct to avoid verbose allegations, to notify the defendants of the claim upon which the Plaintiff seeks recovery, and to assist the disposition of the litigation on the merits. Walter Reade's Theatres, Inc. v. Loew's, Inc., (D.C.N.Y. 1957), 20 F.R.D. 579. As noted by this Honorable Court in Westlake v. Lucas, 537 F.2d 857 (6th Cir. 1976), all a complaint need do is afford the defendant "fair notice of what plaintiff's claim is and the grounds upon which it rests." citing Conley v. Gibson, 355 U.S. 41, 47 (1957). Petitioner additionally submits that Rule 8 of the Federal Rules of Procedure does

not require a plaintiff to specify the legal theory in which relief is sought. Baker v. Lutheran Sparrowbush Associates, (S.D.N.Y. 1992), 808 F.Supp 972. As noted in Evans v. McDonald's Corp., 936 F. 2d 1087 (1991), the purpose of "fact pleading" is to give a defendant fair notice of claims against it without requiring plaintiff to have every legal theory developed in detail before complaint is filed and parties have the opportunity for discovery. Federal pleading is by statement of claim, not by legal theories. Newman v. Silver, 713 F.2d 14 (1983).

In the instant matter, the trial court erroneously dismissed Petitioner's complaint. Such complaint was dismissed, not because the complaint failed to put Respondents on sufficient notice of the

complaint; or, that the pleading was so verbose it was intelligible; or, that it could not assist the disposition of the litigation. Rather, the trial court dismissed Count I of Petitioner's Complaint because it claimed that the complaint did not allege that the signs and steel were taken from Petitioner's property pursuant to a municipal policy; and then dismissed Count II of Petitioner's Complaint because it determined that the facts established that Petitioner had "received all the process it was due."

Petitioner respectfully submits that the trial court abused its discretion because not only did it dismiss Petitioner's complaint on factual merits based upon a prediction of the outcome of the matter, but the trial court also reasoned that the complaint was not

properly pled under one of the three theories of a cause of action arising under Title 42 USC Section 1983.

On page 5 of the trial court's Opinion, the trial court states that "The re are three types of actions that may be brought under Section 1983." citing Zinerman v. Burch, 494 U.S. 113 (1990). The court explained the three types of causes of action and stated that Petitioner's complaint falls under the subsection of "procedural due process" because the complaint did not allege that Respondents violated its "specific rights . . . or that the City's actions were arbitrary and capricious." (Opinion p. 6). The Trial Court does not state that the complaint fails to state a proper claim under 24 USC 1983, but rather, as noted supra., it determined that the complaint does not allege the specific

1983 *theory* under which the Complaint should fall.

To determine whether a pleading is correctly pled under Rule 8, a court must determine whether the plaintiff's complaint sets forth sufficient allegations to establish a claim for relief. Mercado v. Kingsley Area School, 727 F.Supp 335, 338. The correct issue then, is not whether Petitioner complaint stated facts sufficient to form **a cause of action**, but whether the complaint stated facts sufficient to form a **claim**. Id.

The Federal Rules do not require a plaintiff to specify to legal theory in which relief is sought. Baker v. Lutheran Sparrowbush Associates, (S.D.N.Y. 1992), 808 F.Supp. 972. The Opinion of the Trial Court, however, indicates that, at least in part, the complaint was dismissed

because the legal theory of the 1983 action was not pled with specificity. Such reasoning is contrary to established law and the trial court's decision should be reversed.

"The Court's task on a 12(b)(6) motion is a limited one. The issue is not whether a plaintiff will ultimately prevail, but whether the complaint is entitled to offer evidence to support the claims." Mercado, 727 F.Supp. 335, 338 (1989), citing, Scheuer v. Rhodes, 419 U.S. 232, 236 (1974). The trial court in the instant case went beyond its authority when it dismissed Petitioner's complaint. Relative to Count I of the Complaint, the trial court first decided under which legal theory the 1983 action should have been pled, and then dismissed the complaint. As it relates to Count II of the Complaint, the trial court improperly

considered facts outside the record and considered the merits of the case. At this juncture, the merits of the case are not before the trial court.

A trial court is not to dismiss a complaint if it reviews the claim for which relief can be granted even absent allegations of specific fact sufficient to constitute a cause of action. Harris v. U.S., (D.C. Mass, 1962), 204 F.Supp. 228, aff'd, 308 F.2d 573. Unfortunately, in the case at bar, the District Court went beyond the parties' pleadings in dismissing Petitioner's Complaint.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING Petitioner'S COMPLAINT WHEN THE COMPLAINT WAS SUFFICIENTLY PLED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.

Throughout Petitioner's Complaint, Petitioner has maintained that the City of Cleveland, by and through its Mayor, Law Director, Assistant Law Directors and Commissioner took, under color of state law, a parcel of land that lawfully belonged to Petitioner, without authority or privilege to do so. Petitioner has maintained throughout that such conduct was a violation of 42 USC 1983, which states:

> Every person who, under color of statute, ordinance, regulation, custom, or usage of any State or Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to

> the deprivation of any rights, privileges of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress imposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 42 U.S.C. Section 1983.

"In order to state a cause of action under Section 1983, a plaintiff's complaint must allege a deprivation of a right 'secured by the Constitution and laws of the United States' resulting from conduct committed by a person acting under color of state law." Fontana v. Barnham, 707 F.2d 221, at 225 (1983), citing, Parratt v. Taylor, 451 U.S. 527 (1981). Petitioner herein maintains that it's complaint easily meets the requirements set forth in Fontana and Parratt. Indeed,

the subject Complaint, at paragraphs 11 through 14, alleges that the Respondents, acting under color of state law, (i.e. under its municipal authority), willfully, wantonly and/or recklessly and maliciously took two valuable eight foot by eight foot signs from Petitioner at Petitioner's property; and that under color of state law, Respondent's slandered title to Petitioner's property by filing an affidavit with the County Recorder. Petitioner further pled that all of the actions and conduct alleged were done to further the interests of the City. All of the acts alleged were done to diminish Petitioner's control of the building and property in the Lee-Seville area, the location of the theft. As noted in Azar v. Conley, 456 F.2d 1382 (1972), 1389, "It is clear that the protection of Section 1983 extends to the unauthorized abuse of

authority by public officials." In the instant case, Respondents abused their authority in refusing to issue the required permits to Petitioner, thus preventing Petitioner from beginning construction of its building and creating a situation of Force Majeure.

Petitioner respectfully submits that in its consideration of a motion to dismiss an action brought under a civil rights statute, the trial court has a duty to proceed with special care. Indeed, in evaluating any complaint, a court has the duty to view the allegations of the complaint in the light most favorable to the plaintiff, assuming the truth of the factual allegations contained therein. Conley v. Gibson, 355 U.S. 41, 45-48 (1957); L'Orange v. Medical Protective Co., 394 F.2d 57, 59 (6th Cir. 1968). Moreover, as determined in Lucarell v.

McNair, 453 F.2d 836 (6th Cir. 1972), this Honorable Court set forth an even more rigorous standard relative to the dismissal of civil rights claims and stated that an action brought under civil rights statutes "requires (us) to scrutinize such a dismissal with special care." Id. at 837. In a footnote in the Lucarell, case, this Court went on to note that:

> The Third Circuit noted recently: A case brought under the Civil Rights Act should not be dismissed at the pleading stage unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. Scher v. Board of Education of West Orange, 424 F.2d 741, 744 (3rd Cir. 1970).

Lucarell, supra., N1, at 838.

Petitioner contends that Respondents denied it of its right to clean title to the property under color of state law when

it slandered title to the land, and when it removed steel and signs from the land. Based upon the fact that the entire transaction was effected by and through the City of Cleveland pursuant to the actions and authority of its Directors and/or Commissioners, and further based upon the fact that each and every Respondent was acting in their capacity as a city official, the actions, conduct, and transaction were **necessarily** done/performed under the authority of the City and thus under the color of State Law.

Petitioner maintains that Respondents, violated its property rights without affording Petitioner due process as required under the law. At this stage, however, the District Court's dismissal of Petitioner's complaint has denied

Petitioner the opportunity to prove this contention. Petitioner's complaint was erroneously dismissed pursuant to Rule 12(B)(6) of the Federal Rules of Civil Procedure, and it is this Dismissal which Petitioner herein now moves this Honorable Court to reverse. **Petitioner prays for the opportunity to have its action adjudicated upon its merits.** Without such opportunity, Petitioner will suffer additional and irreparable harm and will be unduly prejudiced. Petitioner submits that if required by this Honorable Court, it will **amend its Complaint** but should be granted the opportunity to do so. Absent such opportunity, Petitioner submits that the ends of justice will be thwarted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully moves this Honorable Court to reverse the decision of the Court of Appeals, which decision affirmed the District Court's dismissal of Petitioner's Complaint, and/or permit Petitioner to Amend its Complaint to allow Petitioner to have its day in court and its case decided upon the merits.

Respectfully submitted,

RICHARD G. LILLIE (0023744)
Attorney for Petitioner
55 Public Square, Suite 1331
Cleveland, Ohio 44113
(216) 781-0734

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLEVELAND INDUSTRIAL SQUARE, INC.	)	CASE NO.1:92 CV1430
Plaintiff,	)	JUDGE JOHN M. MANOS
vs.	)	**MEMORANDUM OF OPINION**
MICHAEL R.WHITE, ET AL.,	)	
Defendants.	)	

On July 17, 1992, Cleveland Industrial Square, Inc. ("CIS"), Plaintiff, filed the above-captioned action against Michael R. White (Mayor of the City of Cleveland, Danny R. Williams (Chief Law Director for the City of Cleveland), Kenneth G. Silliman (Chief Assistant Law Director for the City of Cleveland) and Ronald Jones (Commissioner, Division of Environment for the City of Cleveland), (collectively "the City"), Defendants.[1]

APPENDIX A

Plaintiff alleges that the City deprived it of property without due process of law, in violation of 42 U.S.C. §1983 ("Section 1983"). On October 2, 1992, the City filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, its motion is granted.

I. FACTS

On November 7, 1988, the City transferred a parcel of real estate to Plaintiff. The deed required Plaintiff to build a 92,000 square foot building on the property within two years of the date the deed was recorded. It further provided that if the building was not built the City had

---

[1] Defendants are sued only in their official capacities, therefore, this is an action against the City of Cleveland. See, Monell v. New York Dept. of Social Services, 436 U.S. 658, 690, 98 S. Ct. 2018 2035 (1978). Plaintiff can only recover damages from the entity itself, not from the officials. Kendall v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105 (1985).

the right to re-enter, terminate Plaintiff's interest and revest title in itself.[2] On November 29, 1988, the deed was recorded.

Plaintiff did not build the requisite building on the property within the two year period. On March 21, 1991, pursuant to the terms of the deed, the City sent Plaintiff a notice of default stating that Plaintiff

---

[2] The 1988 Deed provides:

> The Grantee further covenants that as provided in the contract, it shall construct a 92,000 s/f building on the land within (2) years from the date this deed is recorded of record; and in the event that prior to the completion of the Improvements by the Grantee, its successors or assigns, as provided in the contract, the Grantee, its successors or assigns shall default in or violate its obligations with respect to the construction of the Improvements as provided in the contract, or shall abandon or substantially suspend construction work on the Improvements, and such default or violation, abandonment or suspension shall not be cured, ended or remedied within three (3) months after written demand by the Grantor to do it then the Grantor shall have the right to re-enter and take possession of the Property and to terminate and revest in the Grantor the Estate hereby convened to the Grantee, ...

had three months to cure its default.

On April 4, 1991, Plaintiff filed a Complaint in the Cuyahoga County Court of Common Pleas seeking a declaration that it was not in default and that the City was not entitled to re-enter, take possession of the property or revest the estate. It also filed a motion for a preliminary injunction enjoining the City from re-entering and taking possession of the property. On April 26, 1991, the City filed an answer and a counterclaim for a declaration that in the event Plaintiff did not construct and complete the 92,000 square foot building within three months of the notice of default, it had the right to re-enter and take possession of the parcel.

On June 25, 1991, the Court of Common Pleas held a hearing on the preliminary injunction and a trial on the merits. Subsequently, the court issued a journal

entry on June 25, 1991, September 3, 1991, and April 24, 1992. All three read: "[p]laintiff's motion for preliminary injunction overruled. (Final.)"[3]

On October 3, 1991, the City re-entered the property because Plaintiff had not appealed the September 3, 1991 judgment entry. In March, 1992, Defendant Kenneth Silliman (Chief Assistant Law Director for the City of Cleveland) advised the Director

---

[3] The April 24, 1992 entry also had a checkmark in the box next to the phrase "DIS. W/PREJ." CIS appealed, and the Eighth District Court of Appeals stated that it was unclear from the journal entry what was dismissed with prejudice. The appellate court stated that this entry could mean that the City's Civ. R. 41(B)(2) Motion challenging CIS's Preliminary Injunction Motion was dismissed with prejudice, or that Plaintiff's Complaint was dismissed with prejudice. The Court of Appeals recognized that the trial judge had ruled from the bench stating, "I'm going to deny your motion for preliminary judgment [sic], which effectively grants the City's cross-claim [sic] for declaratory judgment." However, it held that a trial court can only speak through its journal entries and that the three entries were unspecific and did not adequately inform the parties of the judgment of the court. Furthermore, it stated that the trial court's failure to properly indicate the disposition of the City's counterclaim deprived the appellate court of jurisdiction. Therefore, it dismissed the appeal.

of Economic Development for the City of Cleveland that the property could be shown to interested purchasers. On April 2, 1992, the City received an offer to purchase the property.

On April 30, 1992, the City filed an Affidavit with the Cuyahoga County Recorders Office, pursuant to Ohio Revised Code §5301.252(B)(3), declaring that it had re-entered and taken possession of the property.[4] On July 8, 1992, it removed from

---

[4] Ohio Revised Code §5301.252 provides in pertinent part:

> (A) An affidavit stating facts relating to the matters set forth under division (B) of this section that may affect the title to real estate in this state, made by any person having knowledge of the facts or competent to testify concerning them in open court, may be recorded in the office of the county recorder in the county in which the real estate is situated. When so recorded, such affidavit, or a certified copy thereof, shall be evidence of the facts therein stated, in so far as such facts affect title to real estate.
>
> (b) The affidavits provided for under this section may relate to the following matters:

the property two signs and structural steel, which belonged to Plaintiff.

Count I of the Complaint alleges that the City willfully, wantonly and/or recklessly converted Plaintiff's property by removing the signs and structural steel. Count II alleges that it willfully, wantonly and/or recklessly slandered Plaintiff's title to the real estate by filing the Affidavit in the Cuyahoga County Recorders Office. Both Counts allege that the City's intentional acts "deprived the Plaintiff of its constitutional rights to due process of law," in violation of 42 U.S.C. §1983.

II. ANALYSIS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a Complaint fails to state a claim upon which relief can be

---

(3) The happening of any condition or event that may create or terminate an estate or interest;...

granted if "if appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-6, 78 S.Ct. 99, 102 (1957). The Complaint is to be construed in the light most favorable to the Plaintiff and all factual allegations are to be considered as true. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683 (1974). Furthermore, in ruling on a motion to dismiss, "a court may take judicial notice of the law of a state and records of state court proceedings." Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736 (6th Cir. 1980).

There are three types of actions that may be brought under Section 1983. Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975 (1990). The first is an action brought for a state official's violation of the specific rights defined in the Bill of Rights. Id.

at 125, 110 S.Ct. at 983. The second type is an action under the substantive component of the Due Process Clause that bars arbitrary, wrongful government actions. Id., citing, Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 664 (1986). The third type of claim is an action under the Due Process Clause's guarantee of fair procedure, a procedural due process claim. Id. at 125, 110 S.Ct. at 983.

Plaintiff alleges that the City intentionally converted its signs and structural steel and slandered its title to the real property, and that these acts deprived Plaintiff of its property without due process of law. Plaintiff does not allege that any of its specific rights guaranteed by the Bill of Rights were violated or that the City's actions were arbitrary and capricious. Therefore, it alleges a violation of its right to

procedural due process. See, Zinermon at 126, 110 S.Ct. at 983-84.

"In procedureal due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." Id. at 125, 110 S.Ct. at 983 (emphasis original). In Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976), the Supreme Court established a three-prong balancing test to determine what procedural process the constitution requires in a particular case. The Matthews test weighs the value of the property interest affected by official action, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value or cost of additional or substitute procedureal

safeguards. Id. at 335, 96 S.Ct. at 903.

The City argues that Plaintiff's Complaint should be dismissed under the rule established in Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981) and Hudson v. Plamer, 468 U.S. 517, 104 S.Ct. 3194 (1984). In Parratt[5] and Hudson[6] the Supreme Court enunciated a special application of the Matthews test. Zinermon v. Burch, 494 U.S. 113, 128, 110 S.Ct. 975, 985 (1990). The Supreme Court held that where a deprivation is the result of a random and unauthorized act by a state employee, whether the act is negligent or intentional, the requirements of due process are satisfied by postdeprivation tort remedies under state

---

[5] In Parratt, a prisoner sued under Section 1983 because hobby materials he had ordred were negligently lost by a prison employee.

[6] In Hudson, a prisoner sued under Section 1983 alleging that during a search of his cell a guard deliberately and maliciously destroyed his property.

law. Parratt, 451 U.S. at 541, 543-44, 101 S.Ct. at 1916-17; Hudson, 468 U.S. at 5333, 104 S.Ct. at 3203.

The City's reliance on Parratt and Hudson is misplaced. A municipality is liable under Section 1983 only if "action pursuant to official municipal policy of some nature [has] caused a constitutional tort." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691, 98 S.Ct. 2018, 2038 (1978). A municipality cannot be held liable under Section 1983 on a respondeat superior theory. Id. However, in Parratt and Hudson the Court emphasized that its holding applied only to random and unauthorized acts of state employees, not acts pursuant to established state policy. See, Zinermon, 494 U.S. at 129, 110 S.Ct. at 985. Because a municipality can only be liable for officially sanctioned acts, "its liability can never be premised on the

result of a random and unauthorized act. . . . [and] [t]herefore, a Complaint asserting liability under Monell by definition states a claim to which Parratt is inapposite." Wilson v. Civil Town of Clayton, Ind., 839 F.2d 375, 380 (7th Cir. 1988).

Under Monell, the viability of Plaintiff's Complaint depends on whether the alleged intentional acts of the City can be attributed to an official municipal policy. Official municipal policy generally refers to fixed rules and plans of action to be followed in certain situations. Pembaur v. Cincinnati, 475 U.S. 469, 106 S.Ct. 1292 (1986). However, official municipal policy also exists if a particular course of action is directed by the official or officials with final policy-making authority for the municipality. Id.

Plaintiff's Complaint does not allege that the signs and steel were converted as

a result of an official municipal policy. It does not allege that they were taken pursuant to any fixed rule or plan of action, or allege facts which establish that City officials with final policy-making authority directed that they be taken. Therefore, Count I of the Complaint is dismissed.

Plaintiff's Complaint alleges that the property was re-entered and the Affidavit was filed at the direction of City officials with final policy-making authority. However, Plaintiff does not allege any operative facts to establish that the City's actions deprived it of its property without procedural due process. Plaintiff alleges that: 1.) it was notified by the City of its default under the deed and the City's intent to exercise its rights to re-enter and take possession of the property; 2.) upon such notice, it filed an action in the

Cuyahoga County Court of Common Pleas, seeking a declaration that it was not in default and that the City was not entitled to re-enter and take possession of the property, and a preliminary injunction enjoining the City from exercising its rights; 3.) it received a hearing on its motion for preliminary injunction and a trial on its Complaint for declaratory judgment; and 4.) the City did not re-enter, revest title to the property and file the affidavit in the Cuyahoga County Recorders Office until after the trial court ruled in its favor. These facts establish that Plaintiff received a predeprivation hearing before the City acted. Therefore, it received all the process it was due, and Count II of its Complaint is dismissed.

III. CONCLUSION

For the foregoing reasons, the City's

motion to dismiss is granted.

IT IS SO ORDERED.

_____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLEVELAND INDUSTRIAL SQUARE, INC.	)	CASE NO.1:92 CV 1430
Plaintiff,	)	JUDGE JOHN M. MANOS
vs.	)	**ORDER**
MICHAEL R.WHITE, ET AL.,	)	
Defendants.	)	

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the City's motion to dismiss is granted.

IT IS SO ORDERED.

_____
UNITED STATES DISTRICT JUDGE

APPENDIX B

No. 94-3154

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CLEVELAND INDUSTRIAL SQUARE, INC.,	)	
Plaintiff-Appellant,	)	
VS.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
MICHAEL R. WHITE, Mayor of the City of Cleveland; DANNY R. WILLIAMS, Chief Law Director for the City of Cleveland; KENNETH G. SILLIMAN, Chief Assistant Law Director for the City of Cleveland; RONALD JONES, Commissioner, Division of Environment for the City of Cleveland; and WILLIAM ONDREY GRUBER, Assistant Law Director for the City of Cleveland,	)	
Defendants-Appellees.	)	

BEFORE: MILBURN and NELSON, Circuit Judges, and JOINER,******* District Judge.

*******Honorable Charles W. Joiner, United States District Judge for the Eastern District of Michigan, sitting by

MILBURN, Circuit Judge. Plaintiff Cleveland Industrial Square, Inc. appeals the district court's dismissal of its complaint alleging conversion and slander of title actionable under 42 U.S.C. § 1983 as a deprivation of property without due process of law. On appeal, the issue is whether the district court erred in granting defendants' motion to dismiss plaintiff's complaint pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6). For the reasons that follow, we affirm.

I.

A.

This action is part of an ongoing dispute between plaintiff Cleveland Industrial Square, Inc. and the City of

---

designation.

Cleveland ("City"), Ohio, regarding a tract of land located at 16007 Seville Road in the City's Outerbelt Industrial Park. In 1988, the City agreed to sell plaintiff a six-acre tract of land, and on November 7, 1988, the City entered into a deed development contract, purchase money mortgage, and security agreement with plaintiff. The deed, which was recorded in the Cuyahoga County Recorder's Office on November 29, 1988, required plaintiff to construct a 92,000 square foot building on the property within two years of the date the deed was recorded. The deed further provided that in the event such a building was not constructed, the City would have the right to reenter the property and take possession, terminate plaintiff's ownership interest in the property, and vest title in its own

name.

On March 6, 1990, plaintiff submitted an application to the City for a shell building permit. Such a permit grants an applicant permission to commence construction of a building without specifying its proposed use.[8] The City approved plaintiff's request. On April 3, 1990, plaintiff applied for a use permit under the City's zoning code. However, the City denied the use permit because the intended use of the building as a trash-to-energy plant was not permitted in the area in which the property is located. The City also denied plaintiff's application for

---

[8]A shell permit does not require zoning review or approval because no use for the proposed building is included in the application. However, no new structure can be occupied without proper zoning approval expressed in a use permit.

electrical permits. Plaintiff chose not to proceed with construction of the shell building, and the property remained undeveloped.[9]

In compliance with the deed, the City issued plaintiff a notice of default on March 11, 1991. A second notice was issued on March 21, 1991. These notices informed plaintiff that, according to the terms of the deed, it had three months to cure its default or forfeit ownership and possession of the property. Plaintiff failed to cure the default, and the City reentered the

---

[9]The information in this portion of Part I.A. is included in the interest of a full understanding of the facts. However, because this information is not included in the complaint, we will not consider it in reviewing the district court's grant of defendants' motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12 (b)(6).

property on October 3, 1991, to reassert its possessory rights. On April 30, 1992, pursuant to Ohio Rev. Code Ann. § 5301.252(B)(3),[10] defendant Kenneth G. Silliman, the City's chief

assistant law director, filed an affidavit in the Cuyahoga County Recorder's office purporting to transfer title to the property

---

[10]Ohio Rev. Code Ann. §5301.252 provides in relevant part:
(A) An affidavit stating facts relating to the matters set forth under division (B) of this section that may affect the title to real estate in this state . . . may be recorded . . . When so recorded, such affidavit . . . shall be evidence of the facts therein stated, insofar as such facts affect title to real estate.
B) The affidavits provided for under this section may relate to the following matters:

. . .

(3) The happening of any condition or event that may create or terminate an estate or interest . . . .

to the City by stating that the City had reentered the property and had taken possession after plaintiff's default.

B.

Plaintiff filed this action on July 17, 1992. The complaint sets forth two claims for relief: a claim in conversion and a claim for slander of title. Plaintiff argues that these claims are actionable under 42 U.S.C. § 1983 because defendants' intentional acts "deprived the Plaintiff of its constitutional rights to due process of law." J.A. 53. Plaintiff's conversion claim alleges that on July 8, 1992, defendants removed from the Seville Road property two signs, measuring eight feet by eight feet, and some structural steel, all of which belonged to plaintiff, and thereby converted plaintiff's property. The slander

of title claim concerns the affidavit purporting to transfer title filed by defendant Silliman in the Cuyahoga County Recorder's office.

Defendants filed a joint answer to plaintiff's complaint on August 31, 1992. In the answer, defendants raised for the first time the defense that plaintiff's complaint failed

to state a claim on which relief could be granted. On October 2, 1992, defendants filed a motion to dismiss plaintiff complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim on which relief could be granted. The district court granted defendants' motion to dismiss on January 14, 1994. This timely appeal followed.

II.

Plaintiff argues that the district court abused its discretion by granting defendants' motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Specifically, plaintiff asserts that the complaint complied with Fed. R. Civ. P. 8(a), which sets forth the requirements for a proper complaint, and likewise, that the complaint was sufficiently pled to establish a claim under 42 U.S.C. § 1983. Defendants argue that plaintiff's complaint failed to allege the absence of adequate state remedies to redress the harm purportedly suffered by plaintiff and thus amounted to an inadequate pleading properly subject to dismissal.

Whether the district court properly dismissed plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6) is a

question of law subject to de novo review. Dugan v. Brooks, 818 F.2d 513, 516 (6th Cir. 1987). "'[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Cameron v. Seitz, 38 F.3d 264, 270 (6th Cir. 1994) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In considering a motion under Fed. R. Civ. P. 12(b)(6), it is not the function of the court to weigh evidence or evaluate the credibility of witnesses, Cameron, 38 F.3d at 270; instead, the court "must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set

of facts in support of his claims that would entitle him to relief." In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A district court may not grant dismissal under Fed. R. Civ. P. 12(b)(6) merely because it does not believe the factual allegations of the complaint. DeLorean, 991 F.2d at 1240. Moreover, a court is required to examine the dismissal of a civil rights complaint with special care. Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976).

Plaintiff argues that the district court should not have dismissed the complaint because it complied with Fed. R. Civ. P. 8(a), which requires:

> (1) a short and plaint statement of the grounds upon which the court's jurisdiction depends, unless the court already has

> jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Fed. R. Civ. P. 8(a). Furthermore, plaintiff argues that the district court went beyond these requirements when it dismissed the first count of the complaint on the basis that plaintiff failed to allege that the steel and signs were removed from the property in accordance with a municipal policy, and when it dismissed the second count of the complaint on the basis that the facts contained in the complaint established that plaintiff had "received all the process it was due." J.A. 57. Finally, plaintiff also argues that the district court improperly determined that plaintiff had failed to plead sufficient facts under 42

U.S.C. §1983 after unnecessarily reaching a conclusion about the legal theory on which plaintiff was relying. We disagree.

A.

In this case, the district court found that plaintiff's § 1983 action alleged a violation of the right to procedural due process and judged the sufficiency of the pleadings on that basis. Plaintiff disputes this determination, arguing that Fed. R. Civ. P. 8(a) does not require a plaintiff to specify in his complaint the legal theory on which his claim rests and that the purpose of notice pleading is to give a defendant notice of the claims against him without requiring the plaintiff to develop his legal theories in detail before the conduct of discovery. See Evans v. McDonald's Corp., 936 F.2d 1087, 1091 (10th Cir. 1991).

However, plaintiff misconstrues the district court's findings following its review of the complaint. The district court did not dismiss plaintiff's complaint for failure to specifically state that its claims rested on procedural due process grounds. Rather, the district court merely reasoned, based on the allegations set forth in the complaint, that procedural due process was the nature of Plaintiff's injury. Moreover, it was not necessary for the district court to go beyond the allegations of the complaint to reach its conclusion.

Plaintiff did not allege a violation of any of the rights explicitly guaranteed by the Constitution of the United States, nor did it allege any arbitrary action by government officials that might constitute a violation of plaintiff's

substantive due process rights. Because plaintiff's complaint referred to "no other right, privilege, or immunity secured by the Constitution or federal laws other than the due process clause of the Fourteenth Amendment simpliciter," Parratt v. Taylor, 451 U.S. 527, 536 (1981), overruled to exclude simple negligence as a basis for due process claims, 474 U.S. 327 (1986), the only remaining basis for plaintiff's claim was a denial of the right to fair procedure "without due process of law." Zinermon v. Burch, 494 U.S. 113, 125 (1990). The district court did not exceed its authority by concluding that plaintiff's claim was based on procedural due process concerns; its decision was a necessary part of considering whether plaintiff's complaint was subject to dismissal. See G.M. Eng'rs

& Assocs., Inc. v. West Bloomfield Township, 922 F.2d 328 (6th Cir. 1990) (determining, under similar circumstances, that plaintiff had complained of a procedural due process violation, not a substantive due process violation, and that plaintiff's claim was subject to dismissal).

When a plaintiff asserts a claim for violation of his right to procedural due process, he must show not only a deprivation of life, liberty, or property, effected through state action, but he must also show that the deprivation lacked due process of law. Zinermon, 494 U.S. at 125. "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259 (1978).

In this case, plaintiff alleges that defendants' reentry onto the Seville Road property and their filing of the affidavit constituted a deprivation of property without due process. However, plaintiff failed to allege facts demonstrating the absence of due process. As the district court noted in its memorandum of opinion issued on January 14, 1994, the facts set out in plaintiff's complaint demonstrate that plaintiff was notified of its default and of the City's intent to exercise its rights of reentry and reversion; that plaintiff subsequently filed an action in the Cuyahoga County Court of Common Pleas seeking declaratory and injunctive relief; that plaintiff received a hearing on its claims; and that the City did not reenter the property or exercise its ownership

rights until a decision had been rendered on the matter. Plaintiff had advance warning of defendants' plan to exercise the City's ownership rights by virtue of both the provisions of the deed and the notices of default, and to that end, plaintiff pursued injunctive relief to prevent defendants' actions. The fact that plaintiff has, to date, failed in obtaining such relief does not invalidate its availability. Moreover, we note that plaintiff does not allege any deficiencies in the procedures used to adjudicate its claim or suggest any remedies for perceived shortcomings in the process. Thus, we conclude that plaintiff received a hearing before being deprived of its property and that plaintiff's claim regarding slander of title fails to state facts demonstrating the absence of due

process in the deprivation of plaintiff's property. See Mathews v. Eldridge, 424 U.S. 319 (1976).

Plaintiff argues that in reaching its decision on this issue, the district court examined information outside the allegations of the complaint. However, we find that the district court considered only the facts and allegations set forth in the complaint and in those exhibits incorporated into the complaint, as well as the facts contained in the records of other proceedings involving the same dispute, which any federal court is authorized to consider pursuant to a Fed. R. Civ. P. 12(b)(6) motion. Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th Cir.), cert. denied, 449 U.S. 996 (1980); Barrett v. Baylor, 457 F.2d 119, 124 n.2

(7th Cir. 1972). Furthermore, plaintiff also argues that in reaching its conclusion that plaintiff failed to demonstrate the absence of due process, the district court considered the merits of the case. WE disagree as we do not find that the district court's determination that plaintiff failed to allege any deficiency in the process it received amounted to a consideration of the merits of this litigation, which would involve a balancing of several factors.

B.

The remaining claim in plaintiff's complaint, a "conversion" claim, also alleges that defendants violated plaintiff's procedural due process rights. Because this claim does plead facts sufficient to demonstrate a deprivation of property

without due process, we must consider whether it is subject to the pleading requirements articulated by the Supreme Court in Parratt, 451 U.S. at 543, and Hudson v. Palmer, 468 U.S. 517 (1984). In Parratt, the Court considered whether an inmate stated an adequate claim for violation of his procedural due process rights when he alleged that a package containing his hobby materials had been lost as a result of prison officals' failure to follow official procedure for receipt of mail. The Court recognized that the respondent's pleading included the two essential elements in any § 1983 action, state action and the deprivation of a guaranteed right, privilege or immunity, but it nonetheless held that the complaint should have been dismissed. Parratt, 451

U.S. at 543-44. The Court found that when a petitioner alleges a violation of his right to procedural due process by virtue of random and unauthorized actions by state officials depriving him of his property, the petitioner must show that there are no adequate state remedies to address the harm alleged. Parratt, 451 U.S. at 543-44. The Court reasoned that in situations in which predeprivation due process is not feasible, because swift action is required or because the injury is caused by random and unauthorized action by a state official, postdeprivation remedies are sufficient to constitute due process; they are the only remedies the state could expected to provide. Parratt, 451 U.S. at 539; Zinermon, 494 U.S. at 128. Where such remedies are available, "'the state action

is not necessarily complete. . . .[T]he existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.'" Parratt, 451 U.S. at 542 (quoting Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975), modified en banc, 545 F.2d 565 (1976), cert. denied, 435 U.S. 932 (1978)).

Although the Parratt doctrine originally applied to negligent deprivations of property without due process of law, the Supreme Court extended the doctrine to intentional actions by state actors in Hudson v. Palmer, 468 U.S. at 533. Again, the Court determined that random, unauthorized acts by state officials do not

violate the Due Process Clause as long as a meaningful postdeprivation remedy is available because "the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." Hudson, 468 U.S. at 533.[11]

In Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983), this court held that the requirements of Parratt apply at the pleading stage. "[I]n section 1983 suits for deprivation of property without procedural due process the plaintiff has the burden of pleading and proving the

---

[11]In Daniels v. Williams, 474 U.S. 327 (1986), the Supreme Court overruled its holding in Parratt, but not the so-called Parratt doctrine," finding that acts of simple negligence by state officials cannot serve as the basis for a due process claim. Daniels 474 U.S. at 335-36.

inadequacy of state processes, including state damage remedies to redress the claimed wrong." Vicory, 721 F.2d at 1063. Moreover, we stated that the plaintiff was required to "attack the state's corrective procedure as well as the substantive wrong." Vicory, 721 F.2d at 1066.

Plaintiff's complaint clearly sets forth it claim under the heading "conversion." WE have already noted that this claim is not protected by any specific constitutional provision or federal law other than the Fourteenth Amendment Due Process Clause and that it is a procedural due process claim. Yet, plaintiff does not allege that it is unable to sue in replevin for recovery of the signs and steel allegedly taken from the Seville Road property or that it is unable to pursue a

common law conversion action for damages. Plaintiff makes no allegations of inadequate state remedies and thereby fails to attack the available "corrective procedures." Vicory, 721 F.2d at 1066. "If [Ohio] law has procedures adequate to consider the claim of damages for the asserted violation, there is no procedural due process violation." Gibbs v. Hopkins, 10 F.3d 373, 378 (6th Cir. 1993).

In Zinerman, the Supreme Court narrowed its holdings in Parratt and Hudson, stating that the Parratt doctrine bars a procedural due process claim only if 1) the deprivation was unpredictable or random; 2) predeprivation process was impossible; and 3) the state actor was not authorized to take the action that deprived the plaintiff of his property. Zinermon, 494 U.S. at 136-

39. The controlling inquiry is whether the state was in a position to provide predeprivation process. Mackey v. Dyke, 29 F.3d 1086, 1093 (6th Cir. 1994). Thus, before we can determine if plaintiff's claim is barred by the Parratt doctrine for failure to plead the inadequacy of available state remedies, we must determine that defendants' actions meet these criteria. See Hudson, 468 U.S. at 533. In its memorandum of opinion, the district court noted that plaintiff's complaint includes no allegation that the signs and the steel were taken as a result of municipal policy. Moreover, plaintiff has not alleged that the deprivation of property involved in this claim was caused by the application of established state procedures, to which the Parratt, doctrine is clearly inapplicable.

Watts v. Burkhart, 854 F.2d 839, 9843 (6th Cir. 1988); Macene v. MJW, Inc., 951 F.2d 700, 705-06 (6th Cir. 1991). Instead, plaintiff merely alleges that defendants acted in concert to remove plaintiff's personal property from the Seville Road property. Plaintiff points to no Ohio law or regulation that authorized defendants to remove plaintiff's property without warning or without returning the property to plaintiff. Assuming plaintiff's allegations are true, as we must, the state of Ohio was powerless to offer predeprivation proceedings because it could not have anticipated defendants' actions. Therefore, we conclude that the actions alleged to constitute conversion were unauthorized, random acts not taken pursuant to any established state or municipal policy and

that the conversion claim was properly dismissed for failure to plead inadequate state remedies.

"Allowing the plaintiff in this case to invoke section 1983 in the absence of a showing that state remedies are deficient would 'make of the fourteenth amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" Vicory, 721 F.2d at 1064 (quoting Parratt, 451 U.S. at 544). Accordingly, we conclude that plaintiff's complaint failed to state a set of facts sufficient to constitute a claim actionable under 42 U.S.C. § 1983 and that the district court properly granted defendants' motion to dismiss the complaint

pursuant to Fed. R. Civ. P. 12(b)(6).[12]

---

[12]The district court found that because defendants were sued only in their official capacities, this action amounted to an action against the City and that plaintiff's complaint failed to state that the acts complained of in the conversion claim were undertaken pursuant to an official custom or policy, a prerequisite to a successful claim against the City. Although we find that defendants were sued in both their individual and official capacities, we nonetheless affirm the district court's dismissal of plaintiff's complaint. We agree with the district court that plaintiff did not allege that defendants' actions were taken pursuant to a custom or policy of the City. However, even if we assume that the single instance of conversion about which plaintiff complains amounted to a custom or policy, See Pembaur v. City of Cincinnati, 476 U.S. 469, 480 (1986), plaintiff has failed to allege that the decision to undertake the actions was made by a person with final authority under state law to establish municipal policy with respect to the intentional conversion of plaintiff's property. City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988); Pembaur, 475 U.S. at 481-85. Neither the mayor, nor any of the other city officials named as defendants, have the discretion to establish a municipal policy authorizing intentional conversion of the property of others. See also Garner v.

III.

For the reasons stated, the judgment of the district court is AFFIRMED.

Memphis Police Dep't, 8 F.3d 358, 364 (6th Cir. 1993) (requiring plaintiff to identify the municipal policy causing his injury and connect the policy to the city itself).

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CLEVELAND INDUSTRIAL SQUARE, INC.,
Petitioner,

vs.

MICHAEL R. WHITE, Mayor of the City of Cleveland; DANNY R. WILLIAMS, Chief Law Director for the City of Cleveland; KENNETH G. SILLIMAN, Chief Assistant Law Director for the City of Cleveland; RONALD JONES, Commissioner, Division of Environment of the City of Cleveland; and WILLIAM ONDREY GRUBER, Assistant Law Director for the City of Cleveland.
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

CERTIFICATE OF SERVICE

RICHARD G. LILLIE (0023744)
Counsel of Record for Petitioner
55 Public Square, Suite 1331
Cleveland, Ohio 44113
(216) 781-0734

RICHARD G. LILLIE, a member of the bar of this Court, certifies that pursuant to Rule 33, he served the within Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit, on counsel for Respondent by enclosing copies thereof in an envelope, postage prepaid, addressed to:

The Law Director for the City of Cleveland
City Hall, 601 Lakeside Avenue
Cleveland, Ohio 44113

and depositing same in the United States Mail at Cleveland, Ohio on the 14 day of August 1995 and further certified that all parties required to be served have been served.

RICHARD G. LILLIE (0023744)
Counsel of Record for Petitioner
55 Public Square, Suite 1331
Cleveland, Ohio 44113
(216) 781-0734